Headwaters

To conserve, protect and restore forest ecosystems, clean water, and biological diversity in the Klamath-Siskiyou Bioregion.

February 6, 2006

NEPA Draft Report Comments
c/o NEPA Task Force
Committee on Resources
1324 Longworth House Office Building
Washington, DC 20515

Sent by email to:
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Dear House Resource Committee NEPA Task Force:

Thank you for providing the opportunity to comment on the *Initial Findings and Draft Recommendations* from the National Environmental Policy Act Task Force. We understand that the Task Force is accepting public comments through February 6, 2006. As a result, please accept our comments as timely.

Headwaters is a non-profit conservation organization comprised of hundreds of individuals dedicated to protecting the forests and rangelands, fish and wildlife, and creeks and streams of Oregon and northern California. Headwaters and its members are vitally interested in land management decisions on public lands administered by the Bureau of Land Management and the USDA Forest Service. In addition, we are interested in other federal agencies' actions that come under the auspices of the National Environmental Policy Act (NEPA) and that may impact the region's natural resource heritage. We are very concerned that the Task Force recommendations would weaken NEPA in profound and fundamental ways.

During the Task Force hearing process we provided comments outlining our belief that the NEPA process is vitally important to our members. Specifically, we believe the process is essential to maintaining balance and common sense where environmental decision-making is concerned, and we believe it provides an avenue for our nation's citizens to participate in governmental decision-making that is critical to nurturing a healthy relationship between the governed and its government – a relationship whose strength is vital to maintaining a vibrant democracy.

NEPA was developed by Congress and signed into law as a means of establishing a coherent tool that allows average American citizens to learn how federal projects may affect them. As a former employee of the USDA Forest Service who headed up or was involved in several major projects subject to NEPA, I can attest to the fact that the NEPA process is the best implement in the government's toolbox for examining proposed projects and obtaining public input. It is a process that produces better

decisions – both socially and ecologically. We do not believe a "real" and substantive problem exists, and furthermore are concerned that the proposed "fix" would create severe problems. Specifically, the Task Force has made several recommendations that limit who, when, and how the public can participate in all levels of the NEPA process. These limitations hurt the public by divorcing their legitimate interest and concerns from governmental processes. They would harm government decision-making by limiting opportunities for the NEPA process to catch scientific and analytic errors, reduce public controversy, and build community consensus. Ultimately, they would compromise the environmental heritage of our children by placing unreasonable limitations on the one process specifically designed to ensure that risks are recognized and understood. We anticipate that if pursued, these recommendations would place the vast natural wealth of our nation at risk by increasing likelihood of government decisions with long-term detrimental impacts.

No individual, government decision-maker, agency head or elected official wanted federal actions to produce burning rivers, massive landslides, large-scale fish kills, or species extinctions. None reached a decision with the intent that government action would deprive individuals or communities of their natural heritage. Yet, before NEPA government actions did produce horrifying environmental disasters. We strongly urge the Task Force to reflect on the importance of processes that require careful, thoughtful, analysis and support informed judgment. It does not make sense to curtail our government's ability to understand the risks and benefits of the choices before them, particularly during a timeframe when human demands on our nation's natural resources are increasing dramatically and rapidly.

We are very concerned that many of the recommendations included in the Task Force Report would confound efforts to meet the intent of the law rather than facilitate such efforts. Specific comments/concerns regarding each individual recommendation follow.

Recommendation 1.1: Define "major federal action."
Significant regulatory and legal history exists that comprehensively defines which federal actions are covered by NEPA and which are not. We can only assume that the recommendation is an effort to exclude from NEPA some projects that currently are defined as subject to the law. In our experience, it is far more likely that NEPA is under applied than that it is over applied. That is, projects that should be evaluated in an EIS are instead the subject only of an EA than it is that a project undergoes NEPA analysis when it is not required. We believe this recommendation is unnecessary and fundamentally misguided.

Recommendation 1.2: Mandatory timelines for the completion of NEPA documents.
Making this change could significantly curtail the public's ability to participate. We have been involved in a number of NEPA processes where the government agency released a NEPA document (e.g., an EA or DEIS) during a time of the year when many members of the public are otherwise committed and generally unable to participate. For example, major NEPA documents have been release immediately before the holiday season when Thanksgiving and Christmas plans preclude substantive public participation

during a comment period. In some instances, the agency decision-maker has been receptive to requests for an extension of the comment period. If timelines were mandatory decision-makers would be less able to respond to legitimate community requests for timeline extensions. We oppose this recommendation as a change that would make public participation more difficult.

Recommendation 1.3: Create unambiguous criteria for the use of CEs, EAs, and EISs
The Task Force Report appears to assume that agencies are more likely to exceed their analytical requirements under NEPA than they are to short them. As discussed above in our comments regarding recommendation 1.1, we have not found that to be the case. In fact, we have seen a trend by federal agencies to attempt to do less thorough analyses than the law would require. While there may be some benefit to administrative direction from agency heads reminding their field offices of the existing clear criteria for the use of CEs, EAs, and EISs, this direction should focus on ensuring that agency decision-makers in local offices step up to the analytic burden that they too often have been shirking.

Recommendation 1.4: Address supplemental NEPA documents.
The Task Force Report notes that the language in the recommendation is taken from existing regulations. There is no need to amend the law on this point; the regulations already have amply explicated the statute.

Recommendation 2.1: Give added weight to localized comments.
Major federal actions, by definition, impact interests that have both a local and a national component. These various interests cannot be ranked in importance based on the geographic source of the comment. In addition, it is indisputable that the federal government – and all the actions it undertakes – is supported by taxes collected not just from local individuals and businesses, but also from those located all across the nation. Furthermore, implementation of this recommendation would be extremely difficult. Mailing address alone would not suffice for determining which comments are "localized" and which are not, or distinguishing which commenter would be directly affected. Finally, this nation was founded upon the fundamental precept that all our citizens are equal before the law. This recommendation is an unacceptable violation of the principles of our democracy.

Recommendation 2.2: Establish codified page limits for an EIS.
While everyone who ever has read an EIS, including us, has a longing for coherent, comprehensive, short documents – especially right after wading through a lengthy one – it is unreasonable to establish as a matter of law a limit to the number of pages that can be used to analyze a project. Existing regulations already establish guidelines, and it may be time for agency heads to remind their field staff of the desire to keep it short, but the complexity of projects and the number of issues that must be evaluated hinges on too many variables to establish a legal maximum page length. The point of the NEPA process is to clearly lay out the problem, the potential alternative approaches to dealing with the problem, and the ecological, economic and social merits of each option.

Establish a page length will not guarantee clear writing or thorough analysis and it may make it impossible.

Recommendation 3.1: Grant tribal, state and local governments cooperating agency status.
We have not seen any indication that tribal, state or local governments or other political subdivisions have been unable to provide input during a NEPA analysis – although we certainly have seen such political entities, like other public participants in NEPA, unhappy with the federal decision that ultimately was reached. We must assume that the purpose of this recommendation is to increase the impact of the select entities on federal decision-making, with a concomitant reduction in the impact of the general public. Furthermore, we are concerned that the "fuzzy" definition of "other political subdivisions" would be taken to include groups that are more aligned with the interests of one faction of the public (e.g., water users) rather than the public at large and, thus, would pave the way for certain special interests to "mainline" their concerns into governmental deliberations. As with our discussion regarding recommendation 2.1, this proposal appears to be an effort to elevate the concerns of some over those of others thereby establishing an inequality before the law.

Recommendation 3.2: Allow state review processes to satisfy NEPA requirements
While it is commendable to encourage coordination between state and federal review processes, it is important that national standards be established for analyzing the impacts of federal actions, and providing opportunities for public participation during the analysis. A more appropriate approach would be to work with the states to compare state and federal processes, and clarify which state processes (where they exceed NEPA requirements) must be met in addition to those required by NEPA.

Recommendation 4.1: Establish a citizen suit provision.
These recommendations appear designed to limit a citizen's right to challenge the adequacy of federal decisions. Some of the issues discussed in the recommendation coincide with already established precedent; however, in many cases the elements of the recommendation would expand upon existing limits. We strongly oppose any effort to make it more difficult for a citizen to pursue a remedy from the courts for illegal government actions.

Recommendation 4.2: Require agencies to "pre-clear" projects.
We do not believe a NEPA amendment is needed to inform agencies of NEPA failings identified by the courts and direct them to modify their actions to bring agency actions into compliance with the law. Legal construction already provides the requirement that projects subject to NEPA comply with court rulings interpreting NEPA. Given the fact that many federal actions regularly suffer from the same insufficiency, (for example, with respect to conducting inadequate cumulative effects analyses, compiling incomplete administrative records, or analyzing an insufficient range of alternatives), we would encourage agency heads to provide administrative direction to field offices on these points. We believe that Solicitor's offices for the various agencies already track lawsuits, including NEPA litigation, in which the government is a party and suspect that

they readily could compile an annual summary of the deficiencies found by the courts in agency implementation. Given that NEPA has been the law of the land for some time, few NEPA cases establish new procedural requirements. Most cases in which the judge rules against the government simply find that a federal agency has failed to comply with long understood obligations.

Recommendation 5.1: Limit alternatives to those supported by feasibility and engineering studies.

Hardly any ordinary citizen, and few community groups or local governments have the technical or financial resources to prepare such studies. Industry, on the other hand, has ample resources for completing such studies, particularly with the potential for economic benefit or loss hinging on the details of a given decision, and clearly would receive favored treatment if this recommendation were adopted. Headwaters currently is involved in a collaborative partnership with one of the local governments in our geographic area of interest. As part of this partnership, the collaborative group developed an forest management alternative for lands managed by the USDA Forest Service that lie within the City's domestic water supply watershed. This community alternative was submitted to the Forest Service by the City during scoping and subsequently was analyzed by the federal agency in a DEIS. Had this NEPA amendment already been adopted, this community alternative would not have been accepted for NEPA analysis, as it is highly unlikely that the City would have been able to secure the funds to conduct the feasibility and engineering studies that would have been required.

Recommendation 5.2: Require analysis of no action alternative.

Existing law and CEQ regulations already require that the range of alternatives include a "no action" alternative, and such an alternative assumes things will happen to the affected environment if the proposed action does not occur. By definition, analysis of a "no action" alternative displays the implications of not undertaking the proposed action. For example, with a freeway interchange project, a "no action" alternative assumes that the number of vehicles/day will change whether or not the interchange is constructed and its analysis should display the implications of the changes in traffic pressures in the absence of the proposed interchange This recommended amendment to NEPA is unnecessary.

Recommendation 5.3: Regulations regarding mitigation.

The problem of failure to implement mitigation measures associated with a NEPA decision generally suffers from the same problem that often results in a failure to implement project monitoring plans; that is, a lack of agency funding for mitigation and monitoring. Headwaters strongly supports provisions requiring mitigation and monitoring to be made an integral part of the proposed action, with the expectation that federal actions will not be undertaken – including the environmental mitigation measures and the project implementation and effectiveness monitoring – unless the full project is adequately funded.

Recommendation 6.1: Regulations increasing stakeholder consultation.

While this recommendation appears on its face to be reasonable, we are concerned that the Task Force Report does not define who is, or is not, a "stakeholder" for this purpose. None-the-less, given related discussions provided in the Task Force Report on apparently related recommendations (e.g., preferential treatment recommended in 2.1, 3.1; and limitations on access recommended in 4.1 and 5.1), we suspect that the intent of this recommendation is likely to violate a fundamental democratic principal of this nation. We contend that a wide range of individuals and organizations, as well as a number of governmental bodies, all may have legitimate interests in a given project. Some of these "stakeholders" may be localized and others may represent regional or national interests. As mentioned previously, we believe it is relevant that this nation was founded upon the fundamental precept that all our citizens are equal before the law. Therefore, any effort to establish increasing agency consultation or coordination with interested parties must be equally available to all.

Recommendation 6.2: Require consistency with lead agency provisions

We are not familiar with any federal actions where there has been confusion regarding which agency is the official "lead agency" and therefore see no need for this amendment. Furthermore, we are concerned that the final sentence of this recommendation (i.e., the requirement that this "codification would have to ensure consistency with lead agency provisions in other laws") is a backdoor attempt to establish a precedence of the provisions of the "organic acts" which established the various federal agencies over NEPA and other broadly applicable environmental laws. If the intent of this recommendation is to make compliance with NEPA, the Clean Water Act, the Endangered Species Act, and other environmental laws subservient to agency specific establishment laws, we strongly object to these provisions. Any amendment that, for example, would result in a situation where the Federal Highway Administration need only comply with the Clean Water Act if it places no limitations on the agency's ability to build highways or a situation where the USDA Forest Service need only comply with the Endangered Species Act if it places no limitations on the agency's ability to cut trees is unacceptable to our members and our organization.

Recommendation 7.1: Create NEPA ombudsman

We are unsure why the Task Force believes such an ombudsman is needed or would be helpful. The USDA Forest Service and Bureau of Land Management, the two agencies with which we work most closely, both have administrative appeal processes that allow for review of agency decisions. If legal disagreement still exists following administrative appeal, the dispute can be resolved in the courts. We are unsure how an ombudsman within the Council on Environmental Quality would lessen disagreements regarding agency decisions, facilitate conflict resolution, or focus agency consideration of environmental impacts.

Recommendation 7.2: Direct CEQ to control NEPA costs.

While controlling costs may be a concern, we contend that full open analysis and decision processes are the best way to ensure that federal actions are done right the first time. If this direction is given to the CEQ, we implore the Task Force to direct the Council to examine the issue strategically and broadly assess the costs of reaching

good decisions and not limit the assessment to an examination only of the costs of preparing NEPA documents. It undoubtedly is "cheaper" in the short term to get a short document out quickly than it is to conduct an analysis that thoroughly discloses the environmental impacts of the various options for action available in any given situation. However, if the cheap, quick analysis misses something critical, the total costs to society of implementing a decision that ultimately proves to be poor could be enormous.

Recommendation 8.1: Eliminate past actions from cumulative effects analysis.
Limiting the analysis of the cumulative effects of past actions to an assessment of existing environmental conditions is ecologically shortsighted. In order to understand the risks and opportunities facing an agency in any given NEPA analysis, the decision-maker must know not only the current condition of the lands and waters relevant to the proposed action, the decision-maker must also know how past actions got us to the current point. Current condition is a snapshot description and portrays one point in time. It does not provide trends, explain how changes are related, or provide the framework to examining synergistic responses with past actions. Rather than lowering the bar, we strongly encourage the Task Force to direct the agencies to meet their legal obligations and conduct valid, and therefore informative, cumulative effects analyses.

Recommendation 8.2: Limit future projects in cumulative effects analysis to those already proposed.
This recommendation would place a willful blinder on decision-makers. Agencies typically have a developed multi-year work plan outlining their future project proposals. At any given time, some of these projects have been officially proposed and therefore are involved in some stage of NEPA analysis. However, for many a scoping notice has not yet been released and therefore these projects have not formally been "proposed." Despite this lack of "proposal," the agency already has initiated inventories and pre-project planning on many, and has completed out-year budgeting for initiation on others. These projects are all clearly foreseeable – some even likely to be "proposed" within the year – yet if this recommendation is adopted, none would be included in cumulative effects analyses. This limitation would lead to inadequate disclosure of the choices truly available to the decision-maker and could lead to decisions that preclude future options. It also would establish an artificial arena for public debate and would establish an environment where the NEPA system could be "gamed," by carefully timed scoping notices designed to ensure that the impacts of significant related actions would not be evaluated because the step of officially "proposing" project B is delayed until the effects analysis on project A is complete.

Recommendations 9.1 – 9.3: CEQ studies of federal environmental laws, federal agency staffing issues, and state environmental laws

While all knowledge can be claimed to be useful, in budget limited times, it seems prudent to focus efforts to identify factors that may be constraining NEPA on gathering information most likely to improve NEPA implementation. We suggest that agency staffing issues are likely to be the richest area of investigation. Significant headway has been made, particularly in the past decade, to coordinating NEPA processes with those

dictated by other environmental laws (e.g., the Endangered Species Act), yet we are unaware of any significant effort to evaluate agency staffing issues. Certainly, in some agencies and in some regions of the country, downsizing has led to loss of critical technical expertise within agency personnel rosters. In the land management agencies with which we often deal, there are significant shortages of staff specialists able to analyze impacts of proposed actions of a wide range of ecological parameters (e.g., soil productivity, hydrology, etc.). We suspect this shortage of adequate, qualified staff specialists has hindered the agencies' ability to conduct the required NEPA analyses.

Overall, the recommendations of the Task Force seem designed to limit opportunities for public involvement or to provide preferential access for some members of the public over others, limit the projects that would be subject to NEPA, constrain the information that must be included in a NEPA analysis, or place environmental protections in a subservient position relative to specific agency authorities. To the extent that NEPA implementation has been problematical, these are not the problem areas. From our perspective, most "problems" with NEPA have resulted from agencies consciously choosing to aggressively pursue a proposal that is known to be socially or environmentally controversial – even when an alternative that more reasonably balances the competing public interests is available. Most of the "problems" noted in the Task Force Report are a logical outgrowth of this governmental trend to push for an extreme position rather than embracing a more balanced proposal. Delays, compliance costs, and litigation all are a direct outcome of this choice. The record contains numerous examples of agency decisions that selected the most extreme alternative (e.g., the largest number of trees cut, the greatest ski area expansion, etc.) resulting in appeal and litigation of decisions following drawn-out NEPA analyses supported by multi-volume NEPA documents when other options for public land management would have been embraced by most of the public without controversy. The record also is replete with examples of agency decisions that were reached rapidly to implement large-scale projects (e.g., that produced a significant number of board-feet) with concise NEPA documents. The difference between the two is not whether or not past or reasonable foreseeable future projects were considered in the cumulative effects analysis. Nor is the difference the degree to which all interests were able to participate in the process. The fundamental difference is whether the agency chose to pursue an action that was ecologically sound and acceptable to a wide cross-section of the public.

At its most basic level NEPA is about guaranteeing our nation operates as an informed democracy – providing both for an informed citizenry and informed government decision-makers. NEPA guarantees that Americans affected by a major federal action will get the best information about its impacts on our community, a choice of well designed alternatives to minimize damage, and the right to have our voice heard before the government makes a final decision. NEPA ensures balance, common sense and openness in federal decision-making; it is an effective tool to make sure that our government continues to operate with the consent of the governed.

The recommendations to amend NEPA and embark on drastic regulatory changes that reduce public participation should be rejected. I ask that you listen to the 10 former

members of the Council of Environmental Quality who have said that NEPA does not need any legislative changes.

Thoughtful analysis and review of NEPA long have recognized that while the law itself is sound, there is reason for Congress and the agencies' to focus on improving NEPA implementation. Requiring monitoring of project implementation and ecological impacts, improving management oversight, providing agency personnel with adequate training and resources, and making mitigation promises mandatory are all good ideas that should be pursued. None require amending NEPA or its regulations. All require recognition of how central NEPA is to sensible government decision-making and responsible democratic participation. All depend upon a true commitment to full and honest implementation of this preeminent law.

I strongly urge the Task Force to reconsider its recommendations.

Sincerely,

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cc: The Honorable Ron Wyden
The Honorable Greg Walden
The Honorable Gordon Smith